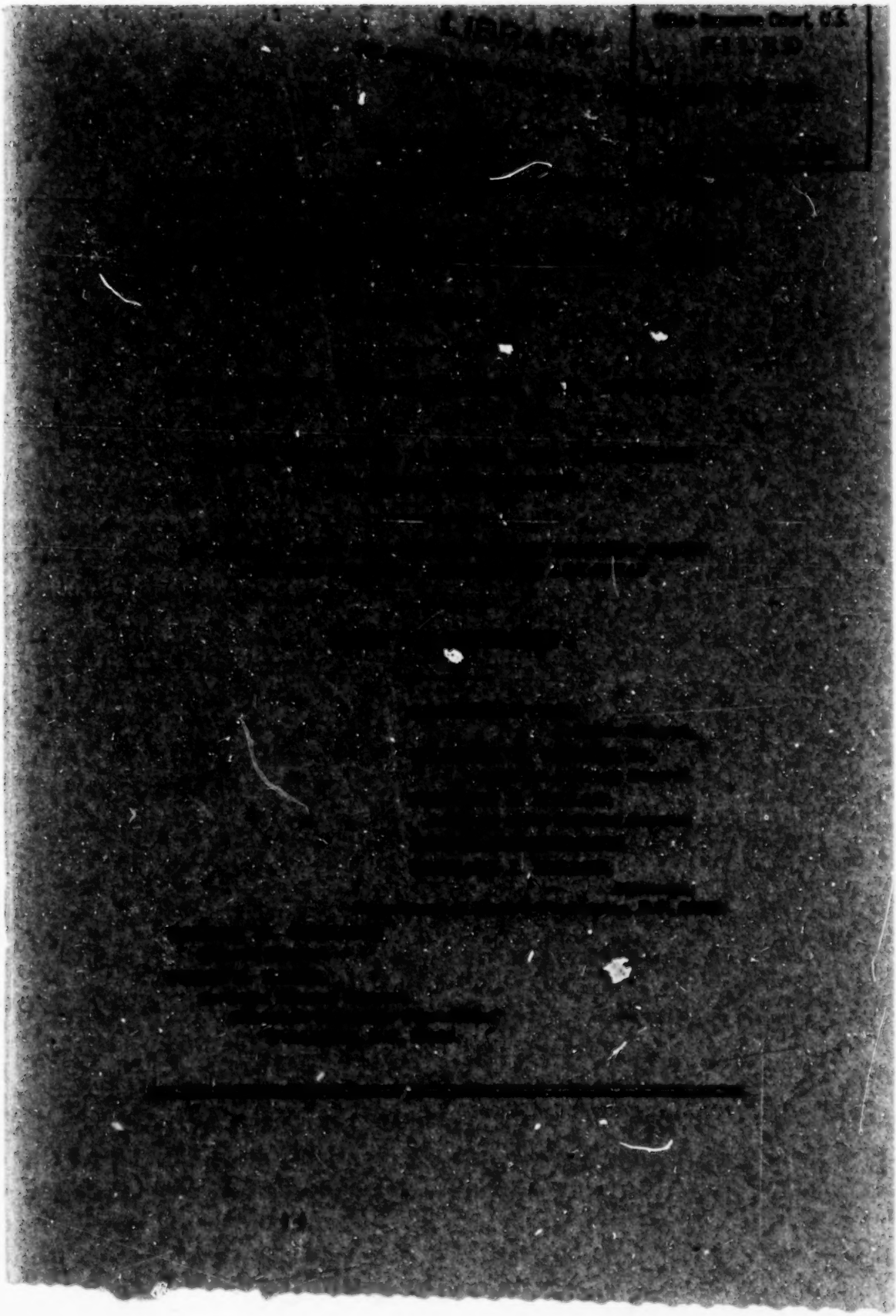

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Summary of argument	8
Argument:	
The Commission properly determined the scope of appellant's prior operations "on May 1, 1958 * * * [and] since that time" and made a proper grant of operating authority	11
A. Section 7(c) of the Transportation Act of 1958 is satisfied by the grant of authority in substantial parity with an applicant's pre-regulation operations	11
B. Under the language of the 1958 Act, the Commission properly considered each of the three commodities, frozen fruits, frozen vegetables and frozen berries, as a separate classification and awarded grandfather rights corresponding to appellant's prior operations involving the particular commodity	16
C. The Commission acted within its administrative discretion in refusing to consider shipments handled before January 1, 1957, in determining the extent of appellant's bona fide operation on May 1, 1958	24
1. Sixteen months of shipments (January 1, 1957, to May 1, 1958) affords the Commission a representative sample of an applicant's operations	24
2. A consideration of appellant's pre-1957 shipments would not have resulted in any broader grant of authority	30

726-162—64——1

Argument—Continued
D. The Commission's grant of authority to transport mixed shipments of frozen fish reflects appellant's prior operations 33
Conclusion 36
Appendix A 37
Appendix B 41
Appendix C 43

CITATIONS

Cases:

Albertelli Common Carrier Application, 83 M.C.C. 236 28
Alton R. Co. v. *United States*, 315 U.S. 15 .. 14, 16, 25, 26, 28
Barrett Line v. *United States*, 326 U.S. 179 ..... 10, 26
Battaglia v. *United States*, C.A. No. 61-321, D. Ore., March 29, 1962, sustaining *Produce Transport Dispatch Common Carrier "Grandfather" Application*, 84 M.C.C. 451 17
Bondurant v. *United States*, 50 F. Supp. 704 15
Bush Transfer v. *United States*, 53 F. Supp. 640 15
Coast Refrigerated Transport Co. Contract Carrier Application, 83 M.C.C. 701 27
Coffee Beans Other Than Green—Poole's Drayage Co., 308 I.C.C. 495 18
Consolidated Freightways Corp. v. *United States*, C.A. No. 40438, N.D. Cal., May 3, 1962, sustaining *Consolidated Freightways, Inc.—Common Carrier Application*, 84 M.C.C. 637 ..... 17, 34
Crescent Express Lines v. *United States*, 320 U.S. 401 .. 15
Fleming Common Carrier Application, 8 M.C.C. 469, sustained, *Alton R. Co.* v. *United States*, 36 F. Supp. 898, affirmed, 315 U.S. 15 24
Frozen Food Express v. *United States*, 219 F. Supp. 131 ..... 19, 28, 29, 30
Frozen Food Exp. Common Carrier Application, 89 M.C.C. 555, reversed, *Frozen Food Express* v. *United States*, 219 F. Supp. 131 27
George Cassens & Sons Common Carrier Application, 1 M.C.C. 771 24
Gregg Cartage Co. v. *United States*, 316 U.S. 74 15

Cases—Continued

Hale Distributing Co., Inc., Common Carrier Application, 89 M.C.C. 361, reversed, *Hale Distributing Co.* v. *United States*, 221 F. Supp. 266 ..... 27, 30, 34
Hollebrand Common Carrier Application—Section 7(c), 83 M.C.C. 711 27
Home Transfer & Storage Co. v. *United States*, 141 F. Supp. 599, affirmed *per curiam*, 352 U.S. 884 18
Inland Motor Freight "Grandfather" Application, 83 M.C.C. 543 34
Interstate Commerce Commission v. *Dunn*, 166 F. 2d 116 34
Interstate Commerce Commission v. *Love*, 77 F. Supp. 63, affirmed, 172 F. 2d 224 33
Interstate Commerce Commission v. *Service Trucking Co.*, 186 F. 2d 400 34
Jarman Common Carrier Application, 84 M.C.C. 343, reversed, *J. Edward Jarman* v. *United States*, 219 F. Supp. 108 27
Lamb Common Carrier Application, 83 M.C.C. 91 34
Lester C. Newton Trucking Co. v. *United States*, 209 F. Supp. 600, affirmed *per curiam*, 372 U.S. 702 5
Lester C. Newton Trucking Co. Common Carrier Application, 84 M.C.C. 759 27
Lewis Common Carrier Application, 82 M.C.C. 755 34
Lipsman-Fulkerson & Co. Common Carrier Application, 84 M.C.C. 618 27
M & H Produce Co., Inc., Common Carrier Application, 86 M.C.C. 647 34
Mangum Trucking Co., Inc., Common Carrier Application, 82 M.C.C. 615 28
Midwest Emery Freight System, Inc. v. *United States*, 202 F. Supp. 229 12
Milk Transport, Inc. v. *Interstate Commerce Commission*, 190 F. Supp. 350, affirmed *per curiam*, 368 U.S. 5 12
Monark Egg Corp. Contract Carrier Application, 52 M.C.C. 576 34
Moore Transp. Co. Common Carrier Application, 3 M.C.C. 585, modified, 18 M.C.C. 629 ..... 24, 25

Cases—Continued
National Moving & Warehouse Corp. v. *Interstate Commerce Commission*, 48 F. Supp. 284 15
Northwest Fisheries Transp. Inc. v. *United States*, C.A. No. 5481, W.D. Wash., May 17, 1962, sustaining *Northwest Fisheries Transp. Inc.*, 89 M.C.C. 324 17
Ragsdale Common Carrier Application, 84 M.C.C. 397 27
Shultz Transit, Inc., "Grandfather" Application, 83 M.C.C. 602 28
United States v. *Carolina Carriers Corp.*, 315 U.S. 475 ..... 9, 14, 15, 16, 19, 20, 21, 22
United States v. *Maher*, 307 U.S. 148 14
Watson Bros. Transp. Co. v. *United States*, 59 F. Supp. 762 15
Winter Garden Co. v. *United States*, 211 F. Supp. 280 ..... 7, 18, 19, 28, 29, 30
Winter Garden Co., Inc., "Grandfather" Application, 86 M.C.C. 347, reversed, *Winter Garden Co.* v. *United States*, 211 F. Supp. 280 27
Wright v. *United States*, 50 F. Supp. 758 15
Statutes:
Interstate Commerce Act, Part II (Motor Carrier Act, 1935), 49 Stat. 543, 49 U.S.C. 301, *et seq.*:
Section 203(a)(14) 21
Section 203(b)(6), 49 U.S.C. 303(b)(6) 3, 11, 37
Section 206, 49 U.S.C. 306 ..... 13, 20
Transportation Act of 1958, 72 Stat. 568, *et seq.*, 49 U.S.C. following 303(b):
Section 7(a) 3, 11, 16, 37, 38
Section 7(c) 3, 4, 5, 8, 11, 12, 17, 19
Miscellaneous:
Ruling 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, CCH Federal Carriers Reports ¶25,107 ..... 11, 18
S. Rep. 1647, 85th Cong., 2d Sess. 11

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 201

WILLIS SHAW FROZEN EXPRESS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR APPELLEES

OPINIONS BELOW

The judgment of the district court, entered without opinion, appears at R. 395–396, and its order denying appellant's motion for rehearing appears at R. 417–418. The report of the Interstate Commerce Commission (R. 334–343) is reported at 89 M.C.C. 377.

JURISDICTION

The final judgment of the district court was entered on March 8, 1963 (R. 417–418). Notice of appeal was filed on April 11, 1963 (R. 418–421), and on October 21, 1963, this Court noted probable jurisdiction (R.

422). 375 U.S. 876. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

The Transportation Act of 1958 subjected motor carriage of eleven previously exempt agricultural commodities, including "frozen fruits, frozen berries, frozen vegetables," to economic regulation by the Interstate Commerce Commission. Section 7(c) of the Act awarded "grandfather" rights to carriers who were in "bona fide operation on May 1, 1958, * * * [and] since that time" in the transportation of the eleven commodities. The questions presented are whether, in determining the extent of appellant's "bona fide operation on May 1, 1958, * * * [and] since that time"—

1. The Commission properly treated frozen fruits, frozen berries and frozen vegetables as comprising separate commodity classes, rather than a single class.

2. The Commission properly refused to consider evidence of shipments handled by the appellant before January 1, 1957, as "too remote" to establish "bona fide operation on May 1, 1958."

3. The Commission properly assessed the evidence of record relating to shipments of frozen fish moving with frozen fruit, frozen vegetables or frozen berries.[1]

---

[1] Under the words of Section 203(b)(6) of the Interstate Commerce Act (App. *infra*, p. 37), a carrier may not transport an exempt commodity (such as frozen fish) in mixed loads with non-exempt commodities (frozen fruit, etc.) without first obtaining specific operating authority. See *Lewis, Common Carrier "Grandfather" Application*, 82 M.C.C. 755.

STATUTES INVOLVED

Section 203(b)(6) of the Interstate Commerce Act, Part II (Motor Carrier Act, 1935), as amended, 49 U.S.C. 303(b)(6), and Section 7 (a) and (c) of the Transportation Act of 1958, 72 Stat. 573, 49 U.S.C. following 363(b), are set forth in Appendix A, *infra*, pp. 37–39.

STATEMENT

In 1958, Congress for the first time made motor carriage of eleven previously exempt agricultural commodities, including frozen fruits, frozen berries and frozen vegetables, subject to regulation by the Interstate Commerce Commission.[2] Section 7(c) of the Transportation Act of 1958 (App., *infra*, p. 38) provided for "grandfather" rights, that is, continued operating authority without the usual showing of need for the service, for "any person [who] was in bona fide operation on May 1, 1958, * * * [and] since that time" in transporting the commodities subjected to regulation. By timely application, filed with the Commission on December 5, 1958, the appellant, a substantial carrier of frozen poultry and frozen foods,[3]

[2] Section 7(a) of the Transportation Act of 1958, 72 Stat. 573, amending 49 U.S.C. 303(b)(6). The text of Section 7(a) is set forth in the Appendix, *infra*, pp. 37–38.

[3] Appellant began motor carrier operations in 1938 as a single proprietorship, transporting fresh fruits and vegetables and live poultry in interstate commerce (R. 160). By 1948, appellant, then a partnership, was transporting frozen commodities as well as fresh produce and poultry and was operat-

sought authorization under Section 7(c) to transport frozen fruits, frozen berries and frozen vegetables and, in mixed shipments with them, frozen poultry, frozen poultry parts, frozen fish and other frozen seafood nonradially over irregular routes, from and to points in 35 States.[4]

Appellant's application, protested by a number of railroads and motor carriers,[5] was heard before an examiner of the Commission. Appellant's evidence included a record of the approximately 5,000 shipments of frozen fruits, frozen vegetables and frozen berries transported by it from May 1954 to October 1960 (R. 205–323). This record disclosed, *inter alia*,

---

ing about 20 tractor and trailer units. In 1957 appellant obtained an interim permit from the Interstate Commerce Commission as a contract carrier to haul frozen poultry and frozen foods and in 1958, this interim authority was changed to that of a common carrier (*ibid.*). Appellant, by then a corporation, was operating 27 tractors and 34 refrigerated trailers in the transportation of frozen commodities (R. 173–174). By 1960, appellant was operating 65 tractors (R. 82, 189–190) and 53 refrigerated trailers (R. 191–192), and employing approximately 100 drivers (R. 161–162).

[4] The States were Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

[5] Protests were lodged by the New York Central Railroad Company, Louisville & Nashville Railroad Company, Boston & Maine Railroad, New York, New Haven, and Hartford Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Texas Railroad Association, class I rail carriers in the Western District, and Pacific Intermountain Express Co., Gillette Motor Transport, Inc., and Western Truck Lines, Ltd. (R. 335).

that appellant never handled shipments of any of the commodities in question from seven of the States with respect to which it sought authority,[6] and that from ten more it transported no such shipments at any time prior to the "grandfather" date of May 1, 1958.[7] From an additional State, Wisconsin, it had transported some shipments, but none were handled by it after July 1954.[8] From none of the origin areas did the appellant serve points in all of the 35 States specified in its application.

The examiner held that appellant's application covering 35 States did not fairly represent the service rendered prior and subsequent to the grandfather date of May 1, 1958. Instead, he ruled that appellant was entitled to a certificate authorizing continued operations along seven radial patterns which corresponded to appellant's prior operations (R. 327). The seven patterns included both state-wide authority for certain origins and destinations and,

---

[6] Alabama, Florida, Indiana, Kentucky, Massachusetts, Mississippi and New Mexico.

[7] Arizona, Colorado, Georgia, Iowa, Louisiana, New Jersey, Ohio, Oklahoma, Tennessee, and Utah.

[8] A 19th State, Idaho, is removed from further consideration, for, as Shaw concedes, all of the loads from there as from Ontario, Oregon, and Zillah, Washington, contained frozen french fried potatoes or other non-exempt commodities, within the meaning of Section 203(b)(6) of the Interstate Commerce Act. See *Lester C. Newton Trucking Co.* v. *United States*, 209 F. Supp. 600 (D. Del. 1962), affirmed *per curiam*, 372 U.S. 702 (holding that french fried potatoes are not within the agricultural exemption). Shipments of the eleven commodities in mixed loads with non-exempt commodities do not qualify for grandfather rights under Section 7(c) of the Act.

726-162—64——2

in other instances, more restrictive city-to-city operation. Without discussion, the examiner treated frozen fruits, frozen vegetables and frozen berries together as a single commodity class so that (for example) transportation of frozen vegetables satisfied the grandfather requirement for the three described categories. He also restricted his consideration of operations prior to the statutory grandfather date to shipments after October 1, 1957. The authority he recommended, although widespread, was far less than appellant had originally sought (R. 331–332). Appellant and certain of the protestants excepted to the examiner's report and order (R. 334).

The report and order of the Commission, Division 1 (R. 334–346), accepted the statement of facts in the examiner's report but reached somewhat different conclusions, enlarging the grant in certain respects and contracting it in others. The Commission treated frozen fruits, frozen vegetables and frozen berries as separate commodity classes and granted authority to transport each such commodity to the extent that appellant's prior operation disclosed that it had been transported. The Commission expanded the scope of the inquiry into operations prior to the statutory date and applied a January 1, 1957, cut-off date. It held that pre-1957 shipments were "too remote" (R. 338). Use of this date resulted in Commission consideration of 16 months of transportation activities by the appellant—from January 1, 1957, to May 1, 1958—involving approximately 800 different shipments, in addition to all operations conducted after May 1, 1958.

The Commission's grant of authority was as follows (R. 342–343):

(a) frozen fruit, frozen berries, and frozen vegetables—

(1) from points in California, Oregon, and Washington to points in Arkansas, Kansas, Missouri, and Oklahoma.

(2) from points in California to points in Iowa, Nebraska, and Texas.

(3) from Chicago, Ill., to Kansas City, Mo.

(4) from points in the Lower Peninsula of Michigan to Kansas City, Mo.

(b) frozen fruit—

(1) from Omaha, Nebr., to Modesto, Calif.

(2) from points in the Lower Peninsula of Michigan to St. Joseph, Mo., Oklahoma City, Okla., Omaha, Nebr., and points in Kansas.

(c) frozen vegetables—

(1) from Omaha, Nebr., to points in Arkansas.

(2) from Ft. Smith, Ark., to Detroit, Mich., Miami and Jacksonville, Fla., and San Francisco, Calif.

(3) from points in Delaware to points in Arkansas.

(4) from points in Minnesota on and south of U.S. Highway 14 to Omaha, Nebr., Kansas City and St. Joseph, Mo., Oklahoma City, Okla., and points in Arkansas and Kansas.

(d) frozen berries from Fort Smith, Ark., to Chicago, Ill.

(e) frozen fish when moving in the same vehicle and at the same time with frozen fruits, frozen vegetables, or frozen berries from Seattle, Wash., and Astoria, Oreg., to points in Arkansas, Kansas, Missouri, and Oklahoma; and from San Fran-

cisco, Monterey, San Jose, and Los Angeles, Calif., to points in Arkansas, Kansas, Missouri, Oklahoma, Iowa, Nebraska, and Texas.

Appellant's petition for reconsideration (R. 346–371) was denied by order of the Commission, Division 1, acting as an Appellate Division, entered February 7, 1962 (R. 386–387).[9]

The district court dismissed the appellant's complaint (R. 388–391) by *per curiam* order entered February 11, 1963 (R. 395–396). On March 8, 1963, it denied rehearing (R. 417–418).

SUMMARY OF ARGUMENT

A. The Transportation Act of 1958 conferred grandfather rights upon all carriers who were in "bona fide operation on May 1, 1958 * * * [and] since that time" (Section 7(c) in the transportation

[9] Appellant has received substantial additional authority in certificates of public convenience and necessity issued by the Commission subsequent to its decision in this case. Thus, appellant's description of the limited service which it was authorized to perform from Arkansas in this proceeding (Br. 18–24) has become, to a large extent, moot. The subsequent certificates, together with the grant of "grandfather" authority, enable it to perform a large number of the operations from Arkansas included in its Exhibit No. 22. Of the 86 shipments listed on pages 20 and 21 of its brief, the appellant will be able to continue to handle some 49. See Certificate MC–117119 and various subnumbers. The listed shipments which the appellant is unable to continue under the Commission's grant of authority would be shipments to Michigan, Mississippi, Nebraska, Oregon and Pennsylvania, never served before the "grandfather" date, and Illinois, Kansas, Missouri and Texas, to which the appellant transported a few shipments of frozen berries and frozen vegetables both before and after the "grandfather" date, but in each instance with an unexplained gap of operations of more than two years' duration. *See, infra*, pp. 25–28.

of the eleven listed agricultural commodities which were made subject to Commission economic regulation in the 1958 Act. In construing a similar grandfather provision in the Motor Carrier Act of 1935, see *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 481, this Court held that the Commission is to provide "substantial parity between future operations and prior *bona fide* operations."

B. Viewed in the context of the 1958 legislation, the Commission's action in considering frozen fruits, frozen vegetables and frozen berries as separate commodity classes was proper. These were three of the eleven separately listed commodities in the 1958 Act, and an award of operating rights for these three items based on previous transportation of only one would run counter to the specific language of the Act. This Court's admonition to the Commission in *United States* v. *Carolina Carriers Corp., supra*, to avoid "atomization" of commodity classes is plainly inapposite. That case involved a general commodity carrier seeking rights under the broad commodity-classification language of the 1935 legislation. The proper interpretation of the specific listing of eleven commodity classes in the 1958 Act poses an entirely different issue. Furthermore, under the original Motor Carrier Act, the Commission was awarding operating rights which were designed to result in certification of economically viable motor carriers. In contrast, the legislation in 1958 was intended merely to allow carriers the opportunity to continue any existing operations involving eleven specific commodity classes.

Finally, a review of the evidence shows that the Commission's award by separate commodities afforded appellant substantial parity with operations actually conducted prior to May 1, 1958.

C. In making its award, the Commission was clearly justified in excluding from consideration shipments transported before January 1, 1957. The January 1, 1957, cutoff date resulted in 16 months of operations being considered as representative of appellant's "bona fide operation on May 1, 1958." This includes, of course, at least one growing season's transportation for every commodity. Adoption of a cutoff date is a reasonable administrative device for keeping the scope of an inquiry into grandfather operations within manageable limits. See *Barrett Line* v. *United States*, 326 U.S. 179. Appellant presented no extenuating circumstances to justify a waiver of the cutoff date in this case. Furthermore, consideration of the pre-1957 shipments does not result in any broader grant of grandfather authority. Appellant's operations before 1957 either fell within the pattern of operations conducted after that date or were so isolated as to be insufficient to justify an award of grandfather rights.

D. The Commission's award of authority to transport frozen fish in mixed shipments with frozen fruits, frozen vegetables, and frozen berries conformed to the evidence submitted by appellant and was also in substantial parity with its prior operations.

ARGUMENT

THE COMMISSION PROPERLY DETERMINED THE SCOPE OF APPELLANT'S PRIOR OPERATIONS "ON MAY 1, 1958 * * * [AND] SINCE THAT TIME" AND MADE A PROPER GRANT OF OPERATING AUTHORITY

A. SECTION 7(c) OF THE TRANSPORTATION ACT OF 1958 IS SATISFIED BY THE GRANT OF AUTHORITY IN SUBSTANTIAL PARITY WITH AN APPLICANT'S PRE-REGULATION OPERATIONS

In the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act), transportation of "agricultural (including horticultural) commodities (not including manufactured products thereof)" was exempted from economic regulation by the Interstate Commerce Commission (Section 203(b)(6), 49 Stat. 544, 49 U.S.C. 303(b)(6)). The scope of the agricultural exemption became the subject of considerable litigation before the Commission and the courts (see S. Rep. 1647, 85th Cong., 2d Sess., pp. 22–23). Accordingly, in the Transportation Act of 1958, Congress fixed its scope by incorporating (with certain exceptions) into Section 203(b)(6) of the Act an administrative ruling by the Commission's Bureau of Motor Carriers (Ruling 107, March 19, 1958), which had made a determination of the exempt or non-exempt status of an exhaustive list of agricultural and horticultural commodities. Eleven commodities, classified as exempt by Ruling 107, were specifically made non-exempt by Section 7(a) of the Act (App., *infra*, pp. 37–38), subjecting carriage of those commodities to Commission regulation. Those commodi-

ties are: "frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (corded, spun, woven, or knitted)."

In the same Act, Congress provided "grandfather" rights for motor carriers which were engaged in transporting the eleven commodities subjected to regulation for the first time. *Midwest Emery Freight System, Inc.* v. *United States*, 202 F. Supp. 229, 234–235 (N.D. Ill.); *Milk Transport, Inc.* v. *Interstate Commerce Commission*, 190 F. Supp. 350, 352–353 (D. Minn.), affirmed *per curiam*, 368 U.S. 5. Section 7(c) declared that such "grandfather" rights should be conferred by the Commission, without the usual proof of a need for the proposed service, to the extent that:

> * * * any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that [Interstate Commerce] Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation, on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time) * * *.

According to this provision, the basis for the award of grandfather rights is an analysis of the operations of the applicant. This analysis has two aspects.

First, the statute requires ascertainment of the applicant's operations on the grandfather date, May 1, 1958, and since that time. With respect to the grandfather date, one day's shipments would give too narrow a view of the applicant's over-all service. Accordingly, the Commission must consider an applicant's operations over a sufficient period of time prior to the statutory date so that the pattern of operations entitled to recognition as grandfather operations may be discerned. (The carrier must also show, of course, that it has continued those operations after May 1, 1958.) Second, the various commodities transported by the applicant during that period and the territories served by him must be classified so that the terms of the "grandfather" certificate will not unduly expand or contract the carriage which the applicant previously provided.

The problem is not new, either to the Commission or to this Court. Almost thirty years ago, when the motor carrier industry was first subjected to federal economic regulation by the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935, Congress conferred similar prescriptive rights on existing carriers. Certificates were to be issued to any firm which was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time" (Section 206, 49 U.C.C. 306). In so doing, "Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by

affording sanction for enterprises theretofore established." *United States* v. *Maher*, 307 U.S. 148, 153.

The key words of the 1935 grandfather clause, as in the grandfather clause of 1958, are that the carrier subjected to economic regulations must have been "in bona fide operation" at certain critical periods. As this Court said in *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 480:

> The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U.S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. * * *

Thus, the scope of grandfather rights in this case is determined neither by the precise operations formerly conducted by the applicant (for the statute excludes those which were "incidental, sporadic, or infrequent" (315 U.S. at 480)) nor by the applicant's holding out to serve a larger area or to transport a wider range of commodities than those of which its past operations were representative ("a holding out * * * is not alone sufficient" (*ibid.*)). In short, "the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior *bona fide* operations'." *United States* v. *Carolina Carriers Corp.*, 315 U.S. at 481. See, also, *Alton*

R. Co. v. *United States*, 315 U.S. 15, 23. All of appellant's arguments basically seek to avoid the limitation inherent in the "substantial parity" standard. It would require the Commission to award grandfather rights solely on the basis of its holding out to the public, rather than on the basis of proof of *bona fide* substantial operations.

We recognize that the test of substantial parity does not mean that the Commission can impose commodity limitations which in effect "restrict the scope of [the carrier's] operations" by ignoring the broad range of the prior service held out to the public and actually rendered. *United States* v. *Carolina Carriers Corp.*, 315 U.S. at 483–484. However, the Court carefully qualified this approach by pointing out that "the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded" (*id.* at 483) and that "Substantial service actually rendered may have been confined to narrow limits" (*id.* at 481).[10] Since "the grandfather clause confers a special privilege, the proviso defining exemptions is to be held to extend only to carriers plainly within its terms." *Gregg Cartage Co.* v. *United States*, 316 U.S. 74, 83; see, also, *Crescent Express Lines* v. *United States*, 320 U.S. 401, 409.

---

[10] See *Watson Bros. Transp. Co.* v. *United States*, 59 F. Supp. 762, 771–774 (D. Nebr.); *Bush Transfer* v. *United States*, 53 F. Supp. 640, 643–644 (W.D.N.C.); *Wright* v. *United States*, 50 F. Supp. 758 (W.D.N.C.); *Bondurant* v. *United States*, 50 F. Supp. 704, 705–706 (M.D.N.C.); and *National Moving & Warehouse Corp.* v. *Interstate Commerce Commission*, 48 F. Supp. 284, 285–286 (S.D.N.Y.).

In the last analysis, the demarcation of territories which an applicant has served, the number of the commodities to be carried and their classification, and the number of shipments to be considered as establishing a pattern of operations for an award of grandfather rights are matters for the Commission's discretion. As this Court noted in *United States* v. *Carolina Carriers Corp.*, 315 U.S. at 480, "The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission." See also *Alton R. Co.* v. *United States*, 315 U.S. 15, 22. That discretion was properly exercised here.

B. UNDER THE LANGUAGE OF THE 1958 ACT, THE COMMISSION PROPERLY CONSIDERED EACH OF THE THREE COMMODITIES, FROZEN FRUITS, FROZEN VEGETABLES AND FROZEN BERRIES, AS A SEPARATE CLASSIFICATION AND AWARDED GRANDFATHER RIGHTS CORRESPONDING TO APPELLANT'S PRIOR OPERATIONS INVOLVING THE PARTICULAR COMMODITY.

The identification of the commodities whose continued truck transportation is protected by grandfather rights in the Transportation Act of 1958 is found in Section 7(a) (App., *infra*, pp. 37–38), which amended the scope of the regulatory exemption. The commodities are listed as follows: "frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)." The appellant in effect contends that the legislation established only nine categories of commodities for which "grand-

father" rights were provided and that "frozen fruits, frozen berries, frozen vegetables" comprise a single "class of frozen food items which were deemed to be exempt" (R. 353; see Br. 13–14), so that the past truck transportation of one of them entitles an applicant to "grandfather" rights to transport all three.

The short answer is that this construction is inconsistent with the statutory listing of separate commodities. Congress did not intend frozen fruits, frozen berries and frozen vegetables to be considered together any more that it intended bananas, hemp and wool to constitute a single class. Substantial parity of "bona fide operation," in the context of Section 7(c), refers to transportation services for each of the eleven commodities to which the grandfather provision referred. There is no reasonable basis for any reading of the Act other than that a prescriptive right to transport each of the listed items must be supported by a separate showing of prior operations. This interpretation has been uniformly sustained by three reviewing courts in addition to the court below.[11]

Congress might have chosen a phrasing which created a single commodity class, as urged by the appel-

---

[11] *Northwest Fisheries Transp., Inc.* v. *United States*, C.A. No. 5481, W.D. Wash., May 17, 1962, sustaining *Northwest Fisheries Transp., Inc., Common Carrier Application*, 89 M.C.C. 324 (1961); *Consolidated Freightways Corp.* v. *United States*, C.A. No. 40438, N.D. Cal., May 3, 1962, sustaining *Consolidated Freightways, Inc.—Common Carrier Application*, 84 M.C.C. 637 (1961); *Battaglia* v. *United States*, C.A. No. 61-321, D. Ore., March 29, 1962, sustaining *Produce Transport Dispatch, Common Carrier "Grandfather" Application*, 84 M.C.C. 451 (1961). *Winter Garden Co.* v. *United States*, 211 F. Supp. 280 (E.D. Tenn.), in which the district court stated a contrary proposition in *dicta*, is discussed *infra*, pp. 18–19.

lant, but it did not. Thus, it could easily have expressed this intent by using the term "frozen fruits and vegetables" as it did with "wool tops and noils." Further, it is significant that Congress listed "frozen fruits, frozen berries, frozen vegetables" separately for the term "frozen fruits" previously had been held, in the context of the original agricultural commodities exemption, to embrace frozen berries as well. *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599, 600 (W.D. Wash.), affirmed *per curiam*, 352 U.S. 884. See, also, Ruling 107 of the Bureau of Motor Carriers, relied upon by Congress in amending the exemption in 1958 in which frozen berries are considered in the same category as frozen fruits. CCH Federal Carriers Reports ¶25,107. That the transportation characteristics of these frozen foods are comparable, as the appellant contends (R. 354), is of no moment; the same might be said of coffee, cocoa and tea, but surely the appellant would not argue that the past movement of one of the latter confers prescriptive rights for all three. Cf., *Coffee Beans Other Than Green—Poole's Drayage Co.*, 308 I.C.C. 495.

Appellees rely upon *Winter Garden Co.* v. *United States*, 211 F. Supp. 280 (E.D. Tenn.), for the proposition that frozen fruits, frozen vegetables and frozen berries are a single commodity classification. There, the district court found on the facts that representative shipments of all three commodities had been hauled from the same plants and warehouse facilities in mixed truckloads (211 F. Supp. at 288–289). Of course, such facts, if correctly found, justi-

fied the grant of authority covering all three commodities. The *Winter Garden* opinion (p. 289) also stated that frozen fruits, berries and vegetables appeared to constitute a single "class" because of similarities in inherent transportation and marketing characteristics. If by this statement the court meant to say that had the evidence shown only shipments of one of these frozen foods, the statute would still have required the grant of grandfather authority covering the others, it was, we submit, in error.[12]

Appellant argues that the consideration of prior operations on a commodity-by-commodity basis is a "pulverization" or "atomization" of its operations which is precluded by the principles of commodity classification set forth in *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475. In *Carolina Carriers*, the applicant had sought grandfather rights under the 1935 legislation as a carrier of general commodities. The Commission, however, "authorized the carriage of about a dozen kinds of commodities, though

[12] A subsequent district court decision narrowly construed *Winter Garden* to avoid the erroneous *dicta* cited above. In *Frozen Food Express* v. *United States*, 219 F. Supp. 131, 140 (N.D. Tex.), the court stated (emphasis in original): "As we construe that [Winter Garden] decision, it holds that under the *proof* in that record, the three commodities in question were one class. The result was reached as a finding on a fact issue, rather than as a matter of law. While the language of the Act may not foreclose a fact issue on this matter, there is nothing in such language indicating that these commodities *must* be treated as one class."

We believe the fact issue in each application for grandfather rights under 7(c) is the extent of applicant's prior operations in each of the commodities specified in the statute, separately viewed.

in prior operations about three times that number had been carried." 315 U.S. at 484. In affirming a district court order setting aside the Commission's action as improper, this Court stated that the Commission "may not atomize [the applicant's] prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in '*bona fide* operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property" (315 U.S. at 483–484).

It is clear, however, that the Commission's consideration of frozen fruits, frozen vegetables and frozen berries as separate commodities under the 1958 Act does not amount to "atomization" of appellant's preregulation carriage, as that term is used in the *Carolina Carriers* case. The 1935 legislation initiated Commission regulation of the entire motor carrier industry. The grandfather clause required bona fide operation as a "common carrier" on the statutory date.[13]

[13] The "grandfather" clause (Section 206(a)) of the Motor Carrier Act of 1935 (49 Stat. 543, 551, 49 U.S.C. 306) provided:

"No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof

Congress did not particularize the commodities for which grandfather rights might be awarded under the 1935 legislation, except to define the term "common carrier" as one who "undertakes * * * to transport passengers or property, or any class or classes of property * * *." Section 203(a)(14), Interstate Commerce Act, 49 Stat. 544.[14] The applicant in the *Carolina Carriers* case had transported many different classes of commodities, but the certificate awarded by the Commission delineated the commodities the applicant could transport within each class and "eliminate[d] commodities which, though of the same general class as the others, had been carried before but not after June 1, 1935." 315 U.S. 475, 482. Thus, this Court's admonition against atomization of the commodity classes previously transported by an applicant must be read in the context of the general language adopted by Congress in authorizing the award of grandfather rights and the Commission's lack of authority to certificate less than an entire class of commodities.

Under the 1958 legislation, Congress spelled out, with precision, the eleven commodities which had formerly been exempt and were now being put under Commission regulation for the first time. By considering frozen fruits, frozen vegetables and frozen berries as separate commodity classes, the Commission was doing no more than observing the classification set up

---

that public convenience and necessity will be served by such operation * * *."

[14] Amendments to this section enacted in 1940 are not pertinent to the point at issue here. See Act of September 18, 1940, Sec. 18(a), 54 Stat. 920, discussed at 315 U.S. at 482, n. 2.

by Congress when it adopted the statute. We would have a problem similar to that presented in *Carolina Carriers* if, under the classification "frozen vegetables", for example, the Commission had granted authority limited to frozen beans (the product actually transported) and denied authority for the shipment of other frozen vegetables. This example points up the fact that "frozen vegetables" is in fact a general commodity classification. Prior shipment of one kind of vegetable is sufficient ground for grandfather authority to transport all kinds. It is not, however, authority to ship commodities outside the class, such as frozen fruits or berries.

The 1935 legislation at issue in *Carolina Carriers* subjected all motor carriers to federal economic regulation for the first time. The grandfather clause was correspondingly broad and its purpose was to establish a viable pattern of operation for all existing motor carriers. This far-ranging regulation of motor carriage is in marked contrast to the limited extension of regulation effected by the 1958 legislation. The purpose of the 1958 grandfather provision has undergone a similar change. It reflects a congressional desire, out of fairness, to preserve for carriers of any of these eleven commodities a right to continue such prior operations. The limited scope of the provision and its purpose suggest that the Commission was correct in considering each category separately. Any other construction would extend rather than preserve existing operations.

Appellant also appears to suggest that, even accepting the Commission's premise that frozen fruits, fro-

zen vegetables and frozen berries are separate commodity categories, it is entitled on the facts to broader authority to transport mixed shipments than that granted. Thus, it states (Br. 16), "The three commodities may be and frequently were transported by Shaw in the same vehicle at the same time (R. 292, 297, 298, 302). Shaw transported all of these subcategories over broad areas prior to the 'grandfather' date." A review of the record pages cited demonstrates, however, that wherever the evidence showed that appellant had transported mixed shipments before May 1, 1958, and thereafter, appellant was granted authority to continue such operations. Indeed, a review of all the evidence of record as compared to the authority awarded by the Commission demonstrates that the award conformed to the appellant's pattern of actual operations in transporting representative shipments of all three commodities.[15] See Appendix B, *infra,* pp. 41–42 for a summary, as to each of the nine States for which grandfather author-

[15] The Commission was satisfied with a showing of representative shipments from one area to another, and, where such a pattern was shown, it did not limit the grant to specific origin and destination points. Thus, in the instant case, the evidence was of a general pattern of the transportation of frozen fruits, frozen berries and frozen vegetables from points in California, Oregon and Washington, an area that produced all three, to Arkansas, Kansas, Missouri, and Oklahoma, an area that consumed all three. The Commission awarded "grandfather" rights covering all three commodities between those areas, even though the appellant had not actually handled all three from all specific origin points to all destination points within the certificated areas.

ity was granted, of the record evidence as to appellant's shipments of the commodities for which authority was denied.

C. THE COMMISSION ACTED WITHIN ITS ADMINISTRATIVE DISCRETION IN REFUSING TO CONSIDER SHIPMENTS HANDLED BEFORE JANUARY 1, 1957, IN DETERMINING THE EXTENT OF APPELLANT'S BONA FIDE OPERATION ON MAY 1, 1958

1. Sixteen months of shipments (January 1, 1957, to May 1, 1958) affords the Commission a representative sample of an applicant's operations

The appellant argues (Br. 17–24) that the Commission erred in not considering shipments handled by it before January 1, 1957, on the ground that they were too remote from the statutory date (R. 338). The statute fixed May 1, 1958, as the date on and following which the applicant must have operated to be entitled to grandfather rights. In administering this provision, just as in administering the 1935 Act, the Commission has taken into consideration operations conducted within a reasonable period in advance of the grandfather date as establishing the state of applicant's operations on that critical date. *Moore Transp. Co. Common Carrier Application*, 3 M.C.C. 585, 587; *George Cassens & Sons Common Carrier Application*, 1 M.C.C. 771, 774. Following its practice under prior grandfather provisions, the Commission also set a limit to the pre-statutory period which it would ordinarily take into account.

(a) The Commission's action in fixing such a time limit is supported by decisions upholding its similar action under prior grandfather provisions. Under the 1935 Act, in *Fleming Common Carrier Applica-*

tion, 8 M.C.C. 469, 471, sustained, *Alton R. Co.* v. *United States*, 36 F. Supp. 898 (E.D. Mich.), affirmed, 315 U.S. 15, the Commission considered only the shipments handled by the applicant between January 1, 1934, and the grandfather date, June 1, 1935 (17 months), although the carrier had commenced operations early in 1933. In *Moore Transp. Co. Common Carrier Application*, 3 M.C.C. 585, 587, modified, 18 M.C.C. 629, the Commission rested its grant of grandfather rights upon the operations conducted by the applicant between January 1, 1935, and the grandfather date, June 1, 1935 (5 months), although the applicant, through its predecessor, had commenced operations in 1929.

Alton R. Co. v. *United States*, 315 U.S. 15, affords further support for the Commission's action in refusing to consider shipments more than 16 months prior to the grandfather date. The case involved an analogous problem—the continuity of operations since the grandfather date. The Court held that the Commission erred in granting grandfather authority to serve all points in an adjacent State where the applicant had made deliveries of automobiles to only a single point and the last shipment had been handled some 14 months prior to the date of the hearing on the application. The Court stated (315 U.S. at 25):

> No explanation of that long hiatus was proffered. But § 206(a) requires a finding of "bona fide operation * * * within the territory" not only "on June 1, 1935" but also "since that time." We cannot say that an unexplained failure to make any shipments to Arkansas for

> over a year "since that time" satisfies the statutory command, even though the nature of the highly specialized transportation service involved be given the greatest weight. Cf. *United States* v. *Maher, supra.* A mere holding out will not alone suffice to bridge the long gap extending through and beyond one entire automobile production year, since applicant carries the burden of establishing his right to the statutory grant.

If an "unexplained failure to make any shipments" for 14 months was grounds for setting aside the award in *Alton R. Co.,* surely the Commission acted reasonably here in agreeing to consider evidence over a full 16-month period.

In a case arising under the grandfather provision of the Water Carrier Act, the Court similarly upheld the Commission's refusal to go back to a period deemed "too remote" from the statutory date. *Barrett Line* v. *United States,* 326 U S. 179, 186–187.[16] The line drawn by the Commission, it found, was well within its "broadly discretionary" authority (326 U.S. at 199).

(b) The January 1, 1957, cut-off date, applied in this case, was no less a proper exercise of discretion. The 16-month period between January 1, 1957, and May 1, 1958, comprised at least one full growing season and, for some commodities, resulted in Commis-

[16] The period allowed by the Commission was four years prior to the grandfather date of January 1, 1940. The Court recognized that, because of problems peculiar to water carriage, this was much longer than had been utilized under the Motor Carrier Act (326 U.S. at 200).

sion consideration of two full growing seasons (see, *e.g.*, R. 7). Such a period permits a fair appraisal of an applicant's operations "on May 1, 1958." The impact of any cut-off date may result in the fortuity that immediately prior shipments are disregarded, but such application of a cut-off date does not invalidate its use as an administrative tool.

The January 1, 1957, cut-off date has been applied by the Commission in many proceedings under the 1958 Act.[17] It is used, however, as a basic starting point rather than as a rigid exclusionary device. Deviation from this standard is permitted when a carrier has been able to demonstrate that pre-1957 shipments bear substantial relevance to a determination of grandfather rights. Thus, the Commission has included pre-1957 shipments in determining the scope of grandfather rights, when they were shown to have been repeated after May 1, 1958, with a certain degree of regularity,[18] or when the lack of shipments during the

---

[17] *Frozen Food Exp. Common Carrier Application*, 89 M.C.C. 555, reversed, *Frozen Food Express* v. *United States*, 219 F. Supp. 131 (N.D. Tex.); *Hale Distributing Co., Inc., Commmon Carrier Application*, 89 M.C.C. 361, reversed, *Hale Distributing Co.* v. *United States*, 221 F. Supp. 266 (S.D. Cal.); *Winter Garden Co., Inc., "Grandfather" Application*, 86 M.C.C. 347, reversed, *Winter Garden Co.* v. *United States*, 211 F. Supp. 280 (E.D. Tenn.); *Lester C. Newton Trucking Co. Common Carrier Application*, 84 M.C.C. 759; *Lipsman-Fulkerson & Co. Common Carrier Application*, 84 M.C.C. 618; *Hollebrand Common Carrier Application—Section 7(c)*, 83 M.C.C. 711; *Coast Refrigerated Transport Co. Contract Carrier Application*, 83 M.C.C. 701.

[18] *Ragsdale Common Carrier Application*, 84 M.C.C. 397; *Jarman Common Carrier Application*, 84 M.C.C. 343, reversed, *J. Edward Jarman* v. *United States*, 219 F. Supp. 108 (D. Md.);

period January 1, 1957-May 1, 1958, was attributable to circumstances beyond the applicant's control, such as the illness of the owner-operator during the January 1, 1957–May 1, 1958 period.[19] The same policy would be applied if a natural catastrophe such as a prolonged drought resulted in no shipments from a certain area during that period. This approach comports with the Court's holding in *Alton R. Co.* v. *United States, supra,* that the burden is on the applicant to present an "explanation of that long hiatus" (315 U.S. at 25). Appellant here made no showing that special circumstances warranted consideration of his pre-1957 shipments.

Appellant relies (Br. 17–18) upon *Winter Garden Co.* v. *United States,* 211 F. Supp. 280 (E.D. Tenn.), and *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex.), for the proposition that its remote shipments should have been considered by the Commission in determining the extent of its bona fide operations on May 1, 1958. In these cases, the district courts held that the applicant should have been given an opportunity to show that operations which it had performed before January 1, 1957, were again conducted by it, wholly or partially, some time after May 1, 1958, and that the lapse of operations between these dates was explained by the character of the traffic rather than by the scope of the applicant's ac-

---

Schultz Transit, Inc., "Grandfather" Application, 83 M.C.C. 602; *Mangum Trucking Co., Inc., Common Carrier Application,* 82 M.C.C. 615.

[19] *Albertelli Common Carrier Application,* 83 M.C.C. 236.

tual operations.[20] If the courts meant that all applicants had to be given that opportunity, we believe that the two decisions are erroneous, since this is in conflict with the basic, indeed necessary, concept of an administrative cut-off date. If, however, the courts were merely stating that upon a tender of proof explaining the necessity for consideration of pre-1957 transportation, the Commission must consider it, we agree, since such a tender would satisfy the Commis-

---

[20] In *Winter Garden Co.* v. *United States*, 211 F. Supp. 280, 288, the district court observed:

"The Commission, in ruling out consideration of the 1956 shipments deprived plaintiff in 025 of a basis for consideration, whether service to 34 points throughout the scope of their operation should be continued. Eight of these points were served in 1956 and again in the summer of 1959. In numerous instances, operations were continued to other nearby points in the same States. Albany, Troy, Binghamton, White Plains, Newburgh, Rochester and New York City were served in 1956, but in 1957 and 1958, prior to May 1, plaintiff was requested to serve only the facilities at Rochester and New York City. Subsequent to May 1, 1958, shipments were again delivered to Rochester, New York City and Albany, and in addition thereto Syracuse, Buffalo, Barker and Brockport."

Similarly, that court (at 211 F. Supp. at 290) noted:

"The rejection of the evidence of 1956 operations in MC-118244 deprived plaintiff of continuing to serve St. Paul and Minneapolis, Minnesota. [St. Paul and Minneapolis were served three times in 1956 and St. Paul again on July 26, 1958]. * * * Only Hopkins was served in 1957 and subsequent to May 1, 1958, and only Hopkins was allowed as a destination point. St. Paul and Fairmont as well as Hopkins were served continuously after that date."

In *Frozen Food Express* v. *United States*, *supra*, the court also held that the Commission had erred in not considering the 1956 shipments handled by the applicant, for, as it said, at 219 F. Supp. at 139, such omission resulted in a "distortion of the true pattern of its activities."

sion's own standards for considering pre-1957 movements.[21]

The Commission's consistent approach to the pre-1957 shipments was correctly characterized in *Hale Distributing Co.* v. *United States*, 221 F. Supp. 266, 270 (S.D. Cal.), as follows: "[T]he shipments in years 1955 and 1956 may or may not be too remote, but such a determination is not to be treated as a question of law heretofore decided in prior cases because it is a question of fact which must turn upon the circumstances of the case at bar and not those of an unlike previous case." As noted, appellant never introduced any special facts justifying an exception to the rule; it relied essentially upon the general proposition that a carrier of agricultural commodities is entitled to introduce evidence of shipments during more than one season.

2. A consideration of appellant's pre-1957 shipments would not have resulted in any broader grant of authority

In this proceeding, appellant submitted abstracts of shipments going back to May 1954, some four years before the critical date of May 1, 1958. Presumably, it would have had the Commission consider all of them as representative of operations conducted on the grandfather date; at least, it has not identified the date it would have regarded as an acceptable cut-

[21] We take no position on whether the tender of proof in the *Winter Garden* and *Frozen Food Express* cases was sufficient to justify consideration of pre-1957 transportation and merely note that both cases are currently pending before the Commission on remand.

off point. However, even more importantly, appellant has failed to indicate, either before the Commission or the court below, what additional operations would have been authorized had the Commission taken into account the earlier shipments. We point out that such shipments as appellant handled before January 1, 1957, either fell into the pattern of operations conducted thereafter (and hence were considered) or were no more than isolated, sporadic movements for which no "grandfather" rights are to be awarded (see, *supra*, pp. 14–15).

Appendix C, *infra*, pp. 43–48, contains a narrative summary of all the record evidence of shipments prior to January 1, 1957. The simple fact revealed is that the pre-1957 shipments not covered by the Commission's grant of authority were either isolated movements, or never repeated after May 1, 1958. Thus appellant was awarded all the authority to which it was entitled even if one takes into account the pre-1957 evidence.

In Appendix C we treat separately (1) the 26 States from which the Commission awarded no grandfather rights as origin points; and (2) the nine States as to which some authority was granted. Seventeen of the States in category (1) originated no shipments prior to January 1, 1957, and appellant was therefore unaffected by the lack of consideration of pre-1957 shipments.[22] As to four of the remaining eight States

[22] Alabama, Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Utah. Idaho and Wisconsin were excluded for the reasons discussed at p. 5, and note 8, p. 5, *supra*.

in that category, appellant is likewise not prejudiced because the pre-1957 shipments were never repeated at any time after the grandfather date.[23] There were pre-1957 shipments from the remaining four States, Kansas, New York, Virginia and Oklahoma, which were repeated after May 1, 1958. However, the pre-1957 movements from all four States totalled less than 15 and there was only one from each State subsequent to May 1, 1958. In the context of appellant's widespread operations—5,000 shipments for the years 1954 to 1960—these isolated shipments were clearly inadequate to establish substantial "bona fide operations" needed to justify the award of grandfather rights.

A similar analysis applies to the operations conducted by the appellant before January 1, 1957, from the nine States from which the Commission awarded it grandfather rights (category (2)) (Appendix C, *infra,* pp. 45–47). With respect to shipments not covered by authority granted in this case, appellant's evidence showed only isolated and widely scattered operations not fairly comprised within its normal operations. Appendix C shows that there were long gaps in service between the sets of origin and destination points for which additional grandfather authority was denied.

Finally, appellant claims that Commission consideration of Shaw's pre-1957 transportation was required by seasonal fluctuations and "climatic and

[23] Maryland, Pennsylvania, Texas and Wisconsin.

crop conditions" (Br. 18).[24] We agree that the Commission must take into account the seasonal nature of agricultural commodities. But appellees' assertions and record references go no further than to say that fruits, berries and vegetables ripen during certain times of the year. The 16-month period which the Commission considered included at least one full growing season for every commodity. Appellant made neither a contention nor an evidentiary showing that any natural disaster in any part of the country occurred so as to render the period January 1, 1957–May 1, 1958, atypical. Moreover, as to the example advanced in appellant's application, cherries from Michigan and strawberries from Oklahoma (R. 7), the record of shipments from those States shows no seasonal pattern (Appendix C, *infra,* pp. 47–48).

In short, the evidence tendered by the appellant supports the scope of authority granted by the Commission and confirms the reasonableness of the time period considered by the Commission. The award of grandfather authority was in substantial parity with appellant's operations "on May 1, 1958 * * * [and] since that time."

D. THE COMMISSION'S GRANT OF AUTHORITY TO TRANSPORT MIXED SHIPMENTS OF FROZEN FISH REFLECTS APPELLANT'S PRIOR OPERATIONS

The motor transportation of frozen fish continues to be, as it always has been, exempt from economic regulation by the Commission. *Interstate Commerce*

[24] It is clear, of course, that Shaw operates all year and is not a seasonal carrier for whom, by the terms of the statute, the Commission must make adjustments in the grandfather date.

Commission v. *Love*, 77 F. Supp. 63 (E.D. La.), affirmed, 172 F. 2d 224 (C.A. 5); *Monark Egg Corp. Contract Carrier Application*, 52 M.C.C. 576. However, the exemption obtains only so long as the vehicle is not used at the same time for the transportation of "non-exempt" commodities. *Interstate Commerce Commission* v. *Service Trucking Co.*, 186 F. 2d 400 (C.A. 3); *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C.A. 5). Accordingly, when by the Transportation Act of 1958 the truck transportation of frozen fruits, frozen berries and frozen vegetables became subject to regulation, the Commission awarded "grandfather" rights for the transportation of frozen fish in mixed shipments with these commodities, to the extent that the applicant had been engaged in bona fide operations on the grandfather date in performing such service. *Lewis Common Carrier Application*, 82 M.C.C. 755.[25] Appellant does not dispute the Commission's interpretation of the statute to require specific operating authority for transportation of such mixed loads (Br. 25).

The Commission awarded the appellant "grandfather" rights to handle mixed shipments of frozen

---

[25] *Hale Distributing Co., Inc., Common Carrier Application*, *supra*, 89 M.C.C. at 365; *M & H Produce Co., Inc., Common Carrier Application*, 86 M.C.C. 647, 650; *Consolidated Freightways, Inc.—Common Carrier Application*, *supra*, 84 M.C.C. at 641; *Inland Motor Freight "Grandfather" Application*, 83 M.C.C. 543, 544–45; *Lamb Common Carrier Application*, 83 M.C.C. 91, 94–95.

fish from several West Coast port cities. The appellant contends that the requirement that the mixed shipment originate at one of these port cities prevents it from initiating "mixed shipments from inland points where the 'mixing' would normally occur" (*i.e.*, loading the fish at the port and adding the frozen fruits or vegetables at an inland point) and that the Commission had effectively destroyed its pre-existing ability to handle mixed shipments (Br. 25–27).

The Commission's grant of authority, however, was in substantial conformity with the showing made of actual prior operations by the appellant. Appellant's evidence establishes that in most instances the frozen fruits, frozen berries or frozen vegetables were loaded at or near the coastal point of loading of the fish, their order of being loaded not being shown of record. Thus, as discussed by witness Shaw (R. 91), a typical shipment of frozen fish from Seattle was transported together with frozen berries from Puyallup and Everett, Washington, less than 30 miles away, an insignificant distance considering that the shipment of frozen fish was destined for Kansas City, Missouri, nearly 2,000 miles away.[26] In these circumstances, the Commission's judgment should be upheld.

[26] The very example cited by the appellant (Br. 26–27) reveals the unsoundness of appellant's position, for the evidence establishes that in the six and a half years covered by the appellant's exhibits it handled only a single mixed shipment of frozen fish from Monterey (R. 198), and it was loaded with other freight from Watsonville (R. 249), only about 20 miles distant.

CONCLUSION

The order of the district court should be affirmed.
Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.
Assistant Attorney General.

STEPHEN J. POLLAK,
Assistant to the Solicitor General.

LIONEL KESTENBAUM,
MICHAEL I. MILLER,
Attorneys.

ROBERT W. GINNANE,
General Counsel.

FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission.

MARCH 1964

APPENDIX A

STATUTES INVOLVED

Part II. Interstate Commerce Act (Motor Carrier Act, 1935) 49 Stat. 543, *et seq.*

Section 203(b)(6), 49 U.S.C. 303(b)(6):[1]

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": Provided further, however, That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)"shall not be deemed to include frozen*

[1] The italicized portion of this section was added by Section 7(a) of the Transportation Act of 1958, 72 Stat. 573.

fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products) * * *.

Transportation Act of 1958

Section 7(a), 72 Stat. 573 (see italicized portion of Section 203(b)(6) of the Interstate Commerce Act, Part II, *supra*).

Section 7(c), 72 Stat. 573:

> Subject to the provisions of section 210 of the Interstate Commerce Act [49 U.S.C. 310], if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) [Section 203(b)(6) amendment] of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made

to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect [August 12, 1958]. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act.

APPENDIX B

ANALYSIS OF APPELLANT'S MOVEMENTS IN EXHIBIT 22 AS COMPARED TO THE COMMODITY LIMITATIONS IN THE GRANT OF GRANDFATHER AUTHORITY

The Commission authorized service from points in nine States—Arkansas, California, Delaware, Illinois, Michigan, Minnesota, Nebraska, Oregon and Washington. Appellant's evidence of shipments from May 1954 through 1960 shows that wherever the Commission granted authority for less than all three commodities, its action reflects the absence of substantial bona fide operations with respect to the others.

1. *Arkansas*—The Commission awarded the appellant no authority to transport frozen fruits. However, with the single exception of a truckload to Texas in April 1957 (R. 231), the appellant handled no shipments of frozen fruits from Arkansas during the six and a half years covered by its Exhibit 22. The appellant at no time transported frozen berries from Arkansas to California, Florida or Michigan, to which the Commission awarded it grandfather rights to transport frozen vegetables.[2]

2. *Delaware and Minnesota*—The Commission conferred no rights to handle frozen fruits or frozen berries, for the appellant at no time on or before the grandfather date transported frozen fruits or frozen berries from these two states.

---

[2] Under authority acquired since the Commission's decision below, the appellant can transport frozen fruits, berries and vegetables from Arkansas to California and Florida. See MC-117119 and Sub-No. 10. See, *supra*, n. 9, p. 8.

3. *Nebraska*—No authority to transport frozen berries from Nebraska was conferred by the Commission, but the appellant at no time transported frozen berries from this State. Appellant at no time transported frozen fruits from Nebraska to Arkansas, to which it was authorized to transport frozen vegetables, or frozen vegetables to California, to which it was authorized to transport frozen fruits.

4. *California, Illinois, Michigan, Oregon and Washington*—From these remaining states, appellant was authorized to handle all three of the commodities in question—frozen fruits, frozen berries *and* frozen vegetables. Only from Michigan did the Commission not authorize transportation of all three commodities to all of the points to which the appellant was certificated to handle shipments. Appellant's evidence showed that from Michigan it transported all three commodities to only one state, Missouri, for which it was awarded grandfather rights.

APPENDIX C

Appellant argues (Br. 17–24) that the Commission should have considered evidence of shipments prior to 1957, set forth in Exhibit 22, as showing the extent of its bona fide operation on May 1, 1958. Such consideration is necessary, it contends, in order to show: (1) a more complete picture of appellant's operations; and (2) a seasonal pattern in appellant's operations which was undisclosed because of the January 1, 1957, cut-off date. An analysis of appellant's shipments listed in Exhibit 22 (starting on May 3, 1954) (R. 205–323) refutes both contentions. We set forth below the facts as to pre-1957 shipments from all the States for which appellant sought grandfather rights and show further, as to two representative States, that appellant's operations are not, in fact, seasonal, but year-round.

1. ANALYSIS OF APPELLANT'S PRE-1957 MOVEMENTS IN EXHIBIT 22 AS COMPARED TO LIMITED GRANTS OF GRANDFATHER AUTHORITY

a. Pre-1957 movements originating in States from which no authority was granted

There were 26 states [3] from which the Commission awarded no "grandfather" rights to originate shipment.[4] From 17 of these states [4] appellant handled

[3] Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Mississippi, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Wisconsin.

[4] Alabama, Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Utah.

no shipments of frozen fruits, berries or vegetables before January 1, 1957. Appellant's grandfather rights were therefore completely unaffected by the Commission's declining to consider earlier shipments. From an additional state, Idaho, any pre-1957 shipments of frozen fruits, berries or vegetables also contained non-exempt commodities, and hence provided no basis for grandfather authority (see, *supra*, p. 5, n. 8).

From four of the remaining eight States,[5] whatever shipments were handled by the appellant before January 1, 1957, were not repeated at any time following the grandfather date. Thus, the shipments afforded no basis for a claim to certification.

As for the other four States, Kansas, New York, Missouri and Virginia, Exhibit 22 showed the following sporadic shipments. From Kansas there was only one State which the appellant served both before January 1, 1957, and again some time after the grandfather date, Missouri. Appellant delivered to it a total of seven shipments before and one after May 1, 1958 (R. 214, 215, 216, 244, 294). Missouri was also the only state which the appellant served from New York both before January 1, 1957, and again after the grandfather date, and it delivered exactly one shipment before and one after (R. 217, 265). From Missouri, the only state which the appellant served both before January 1, 1957, and after the grandfather date, was Illinois, and it handled two such shipments before and one after (R. 223, 260). Finally, Oklahoma was the only state to which the appellant delivered shipments from Virginia before January 1, 1957, and again some time after grandfather date, and, while there were several loads before, there was but one after (R. 310).

---

[5] Maryland, Pennsylvania, Texas and Wisconsin.

b. Pre-1957 movements originating in the States from which grandfather authority was granted

The operations conducted by the appellant before January 1, 1957, from the nine states from which the Commission awarded it grandfather rights fall into one of two categories: They were part of a pattern of service continued with a measure of frequency or regularity throughout the period covered by Exhibit 22, and, hence, embraced within the authority conferred by the Commission, or they were so outside this pattern that their elimination in no way distorted the Commission's view of the scope of appellant's operations.

Arkansas—As to the remaining destinations for which grandfather authority was not granted, the record shows only the most limited number of pre-1957 shipments. From the appellant's home state of Arkansas, the only operation which it conducted to Alabama (for which no authority was granted) at any time on or before the grandfather date was the transportation of a single shipment in September 1956 (R. 226). To Florida, it handled three shipments, one in September 1956 and the others in April and July 1957 (R. 226, 231, 235). To Illinois, there were two shipments which it handled before May 1, 1958, and these were in May and October 1956 (R. 222, 227). To Indiana, there were two, in January 1955 and May 1956 (R. 209, 222). To Kansas, there were three, one in November 1955 and two in May 1956 (R. 217, 222, 223). To Minnesota, there were two, in May 1956 (R. 222, 223). To Missouri, there were 10, all before mid-July 1956 (R. 210, 211, 217, 218, 219, 220, 221, 222, 223, 224). To New York, there were two, one in March 1956 and the other in September 1957 (R. 221, 238). To Texas, there were

two, one in July 1956 and the other in April 1957 (R. 223, 231).

California—The appellant handled only four shipments to Illinois before the "grandfather" date, one in November 1955, one in May 1957 and two in April 1958 (R. 216, 233, 249). To Minnesota, the appellant handled eight shipments, all before March 1956 (R. 212, 213, 214, 216, 220).

Delaware—The appellant handled no shipments before January 1, 1957.

Illinois—The appellant handled three shipments to Kansas on or before May 1, 1958, one in May 1954 and two in October 1954 (R. 206, 207).

Michigan—The appellant served no states before January 1, 1957, and again following the grandfather date that it did not serve as well in the interim period. Accordingly, the scope of operations from Michigan was duly considered by the Commission.

Minnesota—The appellant handled 13 loads to Texas before January 1, 1957, but only five thereafter, in March 1957, and March, April and September 1960 (R. 230, 294, 299, 317, 320).

Nebraska—The appellant handled two shipments to Kansas on or before May 1, 1958, in April 1955 and February 1956 (R. 211, 219). To Missouri, it handled two, in April 1955 and February 1956 (R. 211, 219).

Oregon—There were two movements to Colorado before the grandfather date, in August 1955 and January 1958 (R. 214, 245). To Iowa, there was one, in July 1956 (R. 224) and to Texas, there was one, in December 1955 (R. 218).

Washington—The appellant handled two shipments to Nebraska on or before May 1, 1958, one in November and the other in December 1954 (R. 208, 209).

The appellant handled other shipments from these nine States during the period between May 1954 and January 1, 1957, but other than the foregoing or those to States to which the Commission awarded it grandfather rights, the movements were not repeated again any time after the grandfather date of May 1, 1958.

2. APPELLANT'S MOVEMENTS OF FROZEN BERRIES FROM OKLAHOMA AND FROZEN FRUITS FROM MICHIGAN

Appellant's application cited (R. 7), as illustrative of the seasonal nature of its business, the transportation from Oklahoma of strawberries which ripen in April, May and June, and the transportation from Michigan of cherries which ripen in June and July. However, appellant's Exhibit 22 shows no continuing seasonal pattern in such movements from Oklahoma or Michigan.

Appellant's exhibit establishes that it handled no shipments of frozen berries from Oklahoma at any time on or before the grandfather date of May 1, 1958, and that it transported only three shipments of other of the considered commodities from the State, one in June and two in July 1957 (R. 234, 235, 236).

From Michigan the appellant handled the following shipments of frozen fruits on or before May 1, 1958:

1954	*Date*	*Record*	1955	*Date*	*Record*
	6/23	206		1/6	209
	7/12	207		2/8	209
	8/7	207		3/1	210
	8/10	207		3/3	210
	10/13	207		3/24	210
	10/28	208		4/5	211
	11/1	208		4/15	211
	11/3	208		4/28	211
	12/17	209		6/3	212

1955	*Date*	*Record*	1957	*Date*	*Record*
	6/21	212		7/17	236
	7/5	213		7/18	235
	7/6	213		7/23	236
	7/20	213		7/24	236
	7/21	213		7/31	236
	8/16	214		8/2	237
	10/4	215		8/2	237
	11/1	216		8/5	237
	12/7	218		8/17	237
	12/9	218		8/28	237
1956	1/26	219		9/10	239
	2/27	220		9/10	239
	3/3	221		9/16	239
	3/10	220		10/15	241
	4/12	221		10/26	241
	5/18	222		10/26	241
	5/19	222		11/12	242
	5/21	222		11/29	242
	6/1	223		12/9	243
	6/28	224	1958	1/4	244
	6/29	224		1/29	245
	7/7	223		2/10	245
	7/14	224		3/5	247
	7/18	225		3/7	247
	8/8	225		3/11	247
	8/15	225		3/15	247
	8/29	226		3/19	247
	12/10	228		3/20	248
1957	5/15	233		3/21	248
	5/18	234		3/28	248
	7/15	236		4/7	248

The dates of these shipments refute appellant's contention that its shipments from Michigan were seasonal and that accordingly, it was adversely affected by the May 1, 1958, grandfather date.

U.S. GOVERNMENT PRINTING OFFICE: 1964